

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2104

Cir. Ct. No. 2014CV4791

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

TERRY KIRBY,

PLAINTIFF,

CAROL KOSIBOSKI,

PLAINTIFF-APPELLANT,

v.

ESTATE OF ROBERT B. JAESCHKE AND LORI K. BLOTZ,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
PEDRO COLON, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Carol Kosiboski appeals the dismissal of her statutory and common law misrepresentation claims against Lori K. Blotz, who served as the personal representative for the estate of Blotz’s father, Robert B. Jaeschke.¹ We affirm the order granting summary judgment in Blotz’s favor.

¶2 After Jaeschke died, his estate sold his home to Kosiboski. According to Kosiboski, she subsequently experienced leaking in the basement. Kosiboski and her daughter, Terry Kirby (who lives in the home), sued the estate and Blotz, asserting four claims: (1) breach of contract; (2) intentional misrepresentation; (3) misrepresentation contrary to WIS. STAT. §§ 895.446 and 943.20(1)(d) (2013-14);² and (4) misrepresentation contrary to WIS. STAT. § 100.18. The amended complaint alleged that Blotz and the estate were aware of defects in the basement, failed to correct those defects, and “falsely represented in the sales contract and the Real Estate Condition Report that they were not aware that the basement leaked.”

¶3 Blotz moved for summary judgment, seeking dismissal of all claims on several bases, including: (1) Blotz was entitled to statutory immunity; (2) the estate could not be liable for Blotz’s alleged actions; and (3) Kirby should be dismissed because she did not purchase the property. The circuit court granted the motion after hearing oral argument from the parties. As relevant to this appeal, the circuit court concluded that Blotz was entitled to statutory immunity pursuant to

¹ Kosiboski’s daughter Terry Kirby, who was also a plaintiff, does not appeal. In addition, Kosiboski does not challenge the dismissal of her claims against the Estate of Robert B. Jaeschke.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WIS. STAT. § 860.07, which states that with one exception (not applicable here), “a personal representative has no power to give warranties in any sale, mortgage or lease of property which are binding on the personal representative personally or on the estate of the decedent.” The circuit court also stated that Blotz was not required to make disclosures, pursuant to WIS. STAT. § 709.01(2)(a) (requiring that persons transferring real estate complete a Real Estate Condition Report “does not apply” to personal representatives “if those persons have never occupied the property transferred”). Finally, the circuit court concluded that in any event, a single written statement by Blotz in the Real Estate Condition Report did not support the misrepresentation claims against Blotz. This appeal follows.

¶4 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. *See Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). In this case, we are called upon to construe WIS. STAT. §§ 709.01(2)(a) and 860.07. The interpretation and application of statutes are questions of law that we review independently, but benefiting from the analysis of the circuit court. *See Marder v. Board of Regents of the Univ. of Wis. Sys.*, 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110.

¶5 We begin with the limited facts that were submitted to the circuit court. It is undisputed that acting as the personal representative for her father’s estate, Blotz noted on the offer to purchase: “Seller is selling property to settle estate and [it is] being sold in its present condition.” (Some capitalization omitted.) It is further undisputed that Blotz completed a Real Estate Condition Report by indicating “N/A” for all of the property condition statements listed on

the report. On the last page of the report she typed the words: “Seller does not live in property and is acting only as executor of the owner[’s] estate.” Following those words Blotz handwrote the following: “Foundation repair was completed in May of 2013 and paid bill and waiver of lien documentation are available.” Blotz’s signature and the words “Personal Rep” appear below that statement.

¶6 Blotz argued in her summary judgment motion that she was entitled to statutory immunity because WIS. STAT. § 860.07 provides, in relevant part, that “a personal representative has no power to give warranties in any sale ... of property which are binding on the personal representative personally.”

¶7 In response, Kosiboski asserted that “[WIS. STAT.] § 860.07 merely speaks of a personal representative’s power to give *warranties*; it does not limit a personal representative’s power to sell a property through making *representations* regarding its condition.” Kosiboski also argued that Blotz had “represented in her Real Estate Condition Report that the foundation repairs had been completed on the property.” Kosiboski further argued that Blotz had a duty imposed by common law to disclose defects in the property.

¶8 On appeal, Kosiboski again asserts that WIS. STAT. § 860.07 does not provide immunity for Blotz’s alleged misrepresentations. Kosiboski also continues to contend that Blotz had a duty to disclose defects in the property based on common law. Finally, Kosiboski argues that the circuit court erred when it held that Blotz was “not ... liable for misrepresentation as a matter of law.” (Bolding and some capitalization omitted.)

¶9 Even if we accept for purposes of this decision Kosiboski’s assertion that WIS. STAT. § 860.07 does not provide blanket immunity for any misrepresentations a personal representative may make, we nonetheless affirm the

grant of summary judgment. First, we reject Kosiboski's argument that personal representatives are required to affirmatively disclose defects in the property. WISCONSIN STAT. § 709.01(2)(a) explicitly exempts personal representatives from the disclosure requirements mandated in WIS. STAT. § 709.01(1) (requiring persons who transfer property to comply with the disclosure requirements outlined in WIS. STAT. §§ 709.02 to 709.04 and 709.06).³

¶10 Blotz, acting as personal representative, was exempted from the requirement that she make affirmative disclosures about the home. *See* WIS. STAT. § 709.01(2)(a). Therefore, she answered "N/A" for all questions on the Real Estate Condition Report.⁴ She did, however, offer one handwritten notation, which Kosiboski argues supports her misrepresentation claims. We disagree.

¶11 As noted above, the handwritten notation stated: "Foundation repair was completed in May of 2013 and paid bill and waiver of lien documentation are

³ We recognize that the exemption in WIS. STAT. § 709.01(2)(a) applies only to personal representatives who "have never occupied the property transferred." *See id.* At the motion hearing, Blotz's counsel indicated that Blotz "resided [in the home] for a period during her childhood, but not since she became an adult." We doubt that living in a home as a child disqualifies a personal representative from the exemption granted in § 709.01(2)(a). We need not resolve the issue, however, because it is inadequately briefed. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court will not address issues on appeal that are inadequately briefed). Kosiboski simply asserted in her opening brief that "Chapter 709 of the Wisconsin Statutes *required* Ms. Blotz to make representations in a Real Estate Condition Report," and then stated in her reply brief: "Blotz once occupied the property and was therefore required to complete a Real Estate Condition Report." Kosiboski has offered no analysis of whether a minor can "occupy" a home, as that term is used in § 709.01(2)(a), and thereby negate the exemption provided for personal representatives. We decline to develop an argument for her. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments" for the parties.).

⁴ We decline to discuss whether Blotz's decision to answer "N/A" on a Real Estate Disclosure Form, rather than not complete the form at all, was the best approach under the circumstances, as that issue was not briefed by the parties and does not affect our decision.

available.” Kosiboski argues that this representation “conveyed the meaning that all necessary foundation repairs had been completed.” She further asserts—without having provided any affidavits or other evidence concerning the repairs in opposition to the motion for summary judgment—that “Blotz made some of the necessary foundation repairs while rejecting others to save money” and “skipped on necessary drain tile repairs.” This argument fails for two reasons. First, Blotz’s handwritten language itself does not indicate precisely what repairs were recommended or completed. It is simply a representation that some repairs were made and paid for.

¶12 Second, as the circuit court observed, Kosiboski failed to provide any affidavits in opposition to the motion for summary judgment relating to the work performed.⁵ Kosiboski’s trial counsel’s allegations that “the foundation repairs were not completed” and “there was other work that was recommended to Ms. Blotz that she didn’t follow through on for financial reasons” were not supported by any evidence in the record.

¶13 Kosiboski complains about the circuit court’s decision to consider the meaning of Blotz’s handwritten statement as part of the motion for summary judgment, rather than simply confining its analysis to the statutory immunity issue. However, it was Kosiboski who discussed facts outside the record in responding to the circuit court’s questions about the difference between warranties and representations. Moreover, after the circuit court granted Blotz’s motion and explicitly noted that it “did not receive any ... affidavits indicating what the nature

⁵ Kosiboski’s three-page response to the motion for summary judgment included only a single affidavit from her trial counsel that attached a copy of the Real Estate Condition Report.

of the work would have been nor the extent of work that was incorrectly done,” Kosiboski made no effort to supplement the record or seek reconsideration on grounds that the issue had not been raised in the motion for summary judgment.

¶14 For the foregoing reasons, we reject Kosiboski’s arguments and affirm the order granting summary judgment in Blotz’s favor.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

